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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942

No. 1029

FERDINAND A. KERTESS and CHEMICAL MAR-  
KETING COMPANY, INCORPORATED,  
*Petitioners,*

*against*

THE UNITED STATES OF AMERICA.

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT, AND BRIEF IN  
SUPPORT THEREOF

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JOSEPH H. BRODERICK,  
*Attorney for Petitioner.*



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**PETITION FOR A WRIT OF CERTIORARI TO THE  
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FOR THE SECOND CIRCUIT**

*To the Honorable, the Chief Justice, and the Associate  
Justices of the Supreme Court of the United States:*

The petitioner, Ferdinand A. Kertess, respectfully prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Second Circuit, entered in the case herein on April 13th, 1942 (R. 12), dismissing the appeal taken by him, individually and as sole owner of all of the outstanding shares of the capital stock of Chemical Marketing Company, Incorporated, from the judgment or order of the United States District Court for the Southern District of New York, entered February 17th, 1943, granting leave to the Alien Property Custodian to intervene on behalf of Chemical Marketing Company, Incorporated, and change its plea of not guilty to four indictments to a plea of *nolo contendere*.

### **Jurisdiction of This Court**

This petition is filed within thirty (30) days from the date of the entry of the order for mandate, in accordance with the provisions of Rule 11 of the Rules of Practice and Procedure in criminal cases after a plea of guilty, verdict or finding of guilt. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), U. S. Code, Title 28, Sec. 347, and by Sections 687, 688, 689, U. S. Code, Title 18.

### **Opinions Below**

There were no opinions written in the District Court or the Circuit Court of Appeals.

### **Statement**

The petitioner, Ferdinand A. Kertess, a naturalized citizen of the United States, was indicted in the United States District Court for the Southern District of New York under four separate indictments filed on November 4th, 1942, charging the unlawful exportation and conspiracy to export certain platinum group metals in violation of a Presidential proclamation,\* prohibiting the export of such metals without a license. Also indicted with petitioner were Chemical Marketing Company, Incorporated, a New York corporation, and other persons, named but unapprehended. At the time of the filing of these indictments, the petitioner was President and sole owner of all of the capital shares of common stock of Chemical Marketing Company, Incorporated, a corporation organized under the Laws of the

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\* Proclamation No. 2413, July 2, 1940, as amended, promulgated under authority of the Act of July 2, 1940, C. 508, 54 Stat. 714; U. S. C. A. Title 50, Appendix Sec. 701.

State of New York. The petitioner retained counsel for himself and the Chemical Marketing Company, Incorporated, and pleas of not guilty were entered for both on November 6, 1942 and on January 15, 1943 a formal notice of appearance was filed by their attorney. On February 17th, 1943, an application was made to the United States District Court by the Alien Property Custodian, who had in the meantime seized all the stock of Chemical Marketing Company, Incorporated, from petitioner, for leave to intervene in the action and change the plea of not guilty theretofore interposed for the defendant, Chemical Marketing Company, Incorporated, to *nolo contendere*.

The right of the Alien Property Custodian to supersede counsel duly appointed for Chemical Marketing Company, Incorporated, and intervene in the action was predicated upon an order of the Alien Property Custodian, issued under the authority of the Trading With the Enemy Act, as amended, and Executive Order No. 9095, as amended, determining that Ferdinand A. Kertess is a national controlled by, or acting for and on behalf of a designated enemy country (Germany), and vesting in the Alien Property Custodian the shares of stock owned by Ferdinand A. Kertess in the Chemical Marketing Company, Incorporated.\* Under the compulsion of this order, 200 shares of stock of Chemical Marketing Company, Incorporated, constituting all the outstanding capital stock of said corporation, were transferred by Ferdinand A. Kertess to the Alien Property Custodian, but the right to contest the validity of this action was expressly reserved. New officers and directors were caused to be elected to the corporation by the Alien Property Custodian and the attorney representing the interests of the corporation was discharged.

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\* Alien Property Custodian Vesting Order No. 373 (R. 6).

After oral argument, the District Court granted the application of the Alien Property Custodian and entered an order accepting a plea of *nolo contendere* for the defendant, Chemical Marketing Company, Incorporated. Ferdinand A. Kertess, individually, and as equitable owner of all of the shares of the capital stock of Chemical Marketing Company, Incorporated, filed notices of appeal from this order to the Circuit Court of Appeals of the Second Circuit.

The Custodian made a motion to dismiss the appeal thus taken on the ground that the Chemical Marketing Company, Incorporated, had not authorized the taking of said appeal on its behalf and that the defendant-appellant, Ferdinand A. Kertess, petitioner, had no standing to take said appeal. This motion was granted without opinion by the Circuit Court of Appeals and an order was entered April 13th, 1943, dismissing the appeal (R. 12).

### Questions Presented

1. Does the petitioner, Ferdinand A. Kertess, a naturalized citizen of the United States, have the power, right and authority to select counsel to appear, defend, appeal and represent in criminal proceedings, the Chemical Marketing Company, Incorporated, a New York corporation, all of whose capital stock has been seized from him by the Alien Property Custodian?

2. Is the Alien Property Custodian vested with power to seize stock representing ownership and control by an American citizen of a New York corporation and authorized to intervene in a criminal proceeding against such



corporation, dominating the defense to the criminal charges to the exclusion of the person from whom title was derived by the seizure?

### Specification of Errors

The Circuit Court of Appeals erred:

1. In granting the motion of the Alien Property Custodian to dismiss the appeal from the order of the District Court without considering the merits of the appeal.

2. In permitting the Alien Property Custodian to dominate the defense of the Chemical Marketing Company, Incorporated, to the exclusion of its former owner and ultimate beneficiary.

3. In accepting the plea of *nolo contendere* and thereby denying Chemical Marketing Company, Incorporated, the right to a trial on the indictments.

### Reasons for the Allowance of the Writ

There do not seem to be any applicable decisions by this Court on the questions presented in the foregoing petition, although some phases of the problem have been considered in several of the District Courts where the Alien Property Custodian attempted to intervene and dominate admiralty proceedings instituted against enemy owned vessels. One line of cases holds that the Alien Property Custodian is not entitled to be substituted in the place and stead of the enemy claimants and excluding them from defending the libels for forfeiture (*U. S. v. Italian Steam Vessel Pietro Campanella* and *U. S. v. Italian Steam Vessel Euro*, 1942 A. M. C. 1387, 47 F. Supp. 374 (D. Md.); *The Odenold*, 1942 A. M. C. —); whereas the other line of cases holds the opposite view (*United States of America v. The Vessel Antoinetta*, 1943, A. M. C. 305, E. D. of Pa.). The Cus-

todian's assumption of the right to intervene and dominate the criminal proceedings against the Chemical Marketing Company, Incorporated, constitutes an arrogation of authority far beyond the scope of his statutory powers. The entry of the plea of *nolo contendere* on the application of the Custodian aggravates the injustice to the petitioner and usurps the right to trial. The decisions below constitute a departure from the accepted and usual course of judicial procedure and requires the exercise of this Court's supervisory powers. The problem is of such national scope and importance that it should be clarified and settled by this Court. The administration of criminal justice in the Federal Courts would benefit by the establishment of an authoritative precedent.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in this case; and that the judgment and order of the said Circuit Court of Appeals be reversed and that petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

FERDINAND A. KERTESS,  
*Petitioner.*

JOSEPH H. BRODERICK,  
*Attorney for Petitioner.*

